

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1853

Cir. Ct. No. 2015CV1652

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ERIE BARRY,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND NORTHSTAR
LOGISTICS, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Erie Barry appeals a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) dismissing Barry's claim that Barry's former employer unreasonably refused to rehire her following a workplace injury. We affirm.

BACKGROUND

¶2 In 2010, Barry was hired by Northstar Logistics, Inc. (Northstar) as a delivery driver. Barry would usually transport freight from Milwaukee to other Northstar delivery drivers in Appleton. After arriving in Appleton, Barry would unload the freight from her vehicle so that the other drivers could load that freight into their respective delivery vehicles and start their delivery routes. Barry would also pick up freight from the other drivers before beginning her delivery route to De Pere, Marinette, and sometimes Wisconsin Rapids and Green Bay.

¶3 On March 25, 2013, Barry suffered a work-related injury. As a result of her injury, Barry underwent surgery on September 9, 2013. On October 8 and November 14, 2013, Northstar's president, Shelley Abrams, spoke with Barry about Barry's anticipated return to work. Abrams told Barry that Northstar was undergoing restructuring and, as a result, Northstar could no longer compensate Barry for transporting freight from Milwaukee to Appleton. However, Abrams told Barry that Barry could continue her delivery route from Appleton to De Pere and Marinette. Barry was released by her physician to return to work with no restrictions on December 2, 2013.

¶4 On November 29, 2013, Barry sent a text message to her supervisor, Al Dupree, regarding her work availability. On December 1, 2013, Dupree sent Barry a text message telling Barry to come into work the next day at 7:45 a.m. Abrams told Dupree to offer Barry the Appleton route Abrams had previously discussed with Barry or, alternatively, a separation agreement if Barry refused the Appleton route.

¶5 On December 2, 2013, Barry came into work and met with Dupree and a co-worker in a conference room. At that meeting, Barry rejected Northstar's

offer to rehire her to drive the Appleton delivery route. On December 11, 2013, Northstar sent Barry a letter explaining again the company's restructuring, and informing Barry that it was Northstar's understanding that Barry had rejected Northstar's offer to rehire her to drive the Appleton route and that Barry had until January 15, 2014, to accept the separation agreement offered by Northstar. On December 30, 2013, Barry sent the signed separation agreement to Northstar. Northstar did not fill Barry's position until Northstar received the signed separation agreement, even though December was the busiest time of year for Northstar.

¶6 Barry subsequently filed a claim under WIS. STAT. § 102.35(3) (2011-12)¹ with the Department of Workforce Development, claiming Northstar had unreasonably refused to rehire her following her injury. A hearing followed, at which only Barry and Abrams testified. The administrative law judge (ALJ) determined that Northstar had not unreasonably refused to rehire Barry and dismissed Barry's claim. The ALJ found Barry "was offered a position which she refused."

¶7 Barry petitioned LIRC for review of the ALJ's decision. LIRC modified the ALJ's decision in part and affirmed. Barry then sought review of LIRC's decision by the circuit court. The circuit court affirmed LIRC's decision. Barry now appeals.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶8 To establish a prima facie case of an unreasonable refusal to rehire under WIS. STAT. § 102.35(3), an employee must demonstrate he or she: (1) “was an employee of the employer from which he or she seeks benefits”; (2) “was injured in the scope of [his or her] employment”; and (3) “subsequent to the injury, the employer refused to rehire the employee.” *deBoer Transp., Inc. v. Swenson*, 2011 WI 64, ¶39, 335 Wis. 2d 599, 804 N.W.2d 658. “[W]hen the employee brings forth facts that support all the elements of a prima facie case, the burden shifts to the employer to show reasonable cause for its refusal to rehire the claimant.” *Id.*, ¶43 (citations omitted). On appeal, we review LIRC’s decision, not that of the circuit court. *County of Dane v. LIRC*, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571.

¶9 LIRC’s findings of fact must be upheld on appeal if supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6); *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 53-55, 330 N.W.2d 169 (1983). “Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.” *Cornwell Personnel Assocs. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993) (citation omitted). In other words, LIRC’s findings of fact will be upheld on appeal if “a reasonable person, acting reasonably,” could have made the same factual findings as LIRC. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 250, 453 N.W.2d 487 (Ct. App. 1989). Additionally, it is LIRC’s responsibility to make credibility determinations and to weigh the evidence. *Id.* at 249. Thus, “[a] reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence.” *Princess House, Inc.*, 111 Wis. 2d at 54. Finally, in determining

whether LIRC’s factual findings are supported by credible and substantial evidence, we look at the entire record. *See id.* at 53-54.

¶10 Barry argues LIRC’s decision must be set aside because its factual finding that Barry refused Northstar’s offer to rehire her to drive the Appleton route is not supported by substantial evidence. *See* WIS. STAT. § 102.23(6) (authorizing a court to set aside a LIRC order if the order rests upon a factual finding not supported by credible and substantial evidence). Barry contends LIRC’s finding is not supported by substantial evidence because it is based solely on uncorroborated hearsay—i.e., Dupree’s out-of-court statement to Barry in which he allegedly relayed Northstar’s offer to rehire Barry to drive the Appleton route. *See Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶81, 278 Wis. 2d 111, 692 N.W.2d 572 (reaffirming principle that “uncorroborated hearsay alone does not constitute substantial evidence in administrative hearings”). We are unpersuaded.

¶11 At the hearing before the ALJ, Abrams testified that in October and November of 2013 she told Barry about Northstar’s restructuring and how the restructuring meant Northstar could no longer compensate Barry for transporting freight from Milwaukee to Appleton. Abrams also testified she that told Barry that she could continue her delivery route from Appleton to De Pere and Marinette. In contrast, in her testimony before the ALJ, Barry denied Abrams told her this information. However, Barry conceded that at her December 2, 2013 meeting with Dupree, she was never told she was “terminated.” In addition, Barry testified that after she received Northstar’s December 11, 2013 letter—which informed Barry that it was Northstar’s understanding that she had rejected Northstar’s offer to rehire her to do the Appleton route—she did not follow up with Northstar to correct what she perceived was Northstar’s inaccurate statement

that she had refused an offer from Northstar to rehire her. LIRC relied, in part, on this specific testimony from Abrams and Barry to find that Barry refused Northstar's offer to rehire her to do the Appleton route. Thus, contrary to Barry's assertion, LIRC's factual finding was not based solely on uncorroborated hearsay. LIRC's findings of fact are supported by credible and substantial evidence, and we therefore must affirm.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

